Supreme Court, U.S.
FILED

NO. 00-7130CT 24 2000

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

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GLORIA SARNO, G.M.F.C., INC.,
GLORIA MARSHALL SALON OF TORRANCE,

*Petitioners,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

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**On Petition For Writ of Certiorari**
**To The Second District Court Of Appeal**
**Of The State Of California**

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# APPENDICES TO PETITION FOR WRIT OF CERTIORARI
**(Volume I, App. 1 - 45)**

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*GLORIA SARNO, G.M.F.C., INC., and GLORIA MARSHALL SALON OF TORRANCE*

Court of Appeal, Second Appellate District, Division One - No. B130037
S089232

IN THE SUPREME COURT OF CALIFORNIA

En Banc

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GLORIA SARNO, et al., Appellants,

v.

STATE OF CALIFORNIA, et al., Respondents.

---

Petition for review DENIED.

SUPREME COURT
FILED
JUL 26 2000
Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION: 1

DATE: May 26, 2000

Richard E. Eldred
700 N. Central Avenue
Suite 240
Glendale, CA 91203-1240

Gloria Sarno, et al.
v.
State of California

B130037
Los Angeles County No. BC202691

THE COURT:

Petition for rehearing is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

| | |
|---|---|
| GLORIA SARNO et al., | ) B130037 |
| | ) |
| Plaintiffs and Appellants | ) (Los Angeles County |
| | ) Super. Ct. No. BC 202691) |
| v. | ) |
| | ) COURT OF APPEAL |
| STATE OF CALIFORNIA, et. al. | ) SECOND DISTRICT |
| | ) FILED May 9, 2000 |
| Defendants and Respondents | ) Joseph A. Lane, Clerk |
| _____ | ) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Affirmed.

Law Offices of Richard E. Eldred and Richard E. Eldred for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Senior Assistant Attorney General, Jerry Smilowitz, Deputy Attorney General; Gil Garcetti, Deputy Attorney (Los Angeles), Thomas A. Papageorge, Heady Deputy District Attorney, and Dana Aratani, Deputy District Attorney, for Defendants and Respondents.

In a prior action, plaintiffs were found to be judgment debtors on the theory that they were alter egos of the named defendants. Plaintiffs appealed the judgment, but the appeal was dismissed as untimely. Plaintiffs then brought this action to set aside the judgment. The trial court dismissed the action on demurrer. We affirm.

BACKGROUND

On February 14, 1995, the People of the State of California (the "State") filed an action against Gloria Marshall America, Inc., a weight reduction salon for women (*State of California v. Gloria Marshall America, Inc.* (Super. Ct. L.A. County, 1995, No. BC121888)). Also sued were the company's officers and owners, Mark and Kellee Bergendahl. The complaint alleged that the defendants had engaged in deceptive advertising and unfair competition. On September 14, 1995, the State filed a first amended complaint, adding FBS, Inc. – the new name of Gloria Marshall America, Inc. – as a defendant.

For the next two years, the State engaged in discovery directed at proving that Gloria Sarno (nee Gloria Marshall) and several of her companies were the alter egos of the named defendants (FBS, Inc. and the Bergendahls).[1] For example, the State subpoenaed documents from G.M.F.C., Inc. and Gloria Marshall Salon of Torrance, two nonparty businesses owned by Sarno. The State also served Sarno with a deposition subpoena. Sarno and the non-party companies refused to comply with the subpoenas. The State successfully moved to compel discovery and was awarded $6,700 in sanctions.

During the discovery phase, Scott Fraser, Esq. of Nelson & Nelson, represented the named defendants as well as Sarno and her nonparty businesses. Fraser clearly understood that the State was pursuing an alter ego theory of liability as to Sarno and her companies. By way of example, in a letter to the State dated October 17, 1996, Fraser commented: "With respect to the single enterprise theory, [the State] would have to prove that the other Gloria Marshall entities benefitted from the monies taken in by [FBS, Inc.], made capital contributions to fund the operation of the salons, and treated [FBS, Inc.] as their own. [FBS, Inc.] did in fact receive favorable business treatment from Gloria Sarno and some of her businesses because of the familial

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[1] Defendant Mark Bergendahl is Gloria Sarno's son.

relationship, i.e., GMFC agreed to extend the dates for repayment of loans, but Mrs. Sarno and her businesses did not transact business with [FBS, Inc.] with the intent to run [it] or to influence its operations."[2]

On or about March 6, 1997, one month before trial, the State moved for leave to amend the complaint to add Sarno and her nonparty businesses as defendants. The superior court denied the motion.[3] For their part, defendants moved in limine to exclude evidence regarding the possible existence of alter egos. That motion, too, was denied. On April 7, 1997, the case was tried to the court. At the beginning of trial, the court ruled that the parties could offer evidence concerning alter egos.

The trial lasted more than two months, ending on June 20, 1997. On August 29, 1997, the superior court issued a "Statement of Intended Decision." In response, the State filed a "corrected/proposed" statement of decision. Defendants filed objections. On October 30, 1997, the superior court filed its "Statement of Decision,' consisting of 32 pages, 25 of which were devoted to the alter ego issue. The court concluded that Sarno and her nonparty businesses were the alter egos of the named defendants.[4]

On February 24, 1998, the superior court entered judgment in accordance with the statement of decision. On the

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2 Fraser also represented the named defendants at trial.

3 To avoid confusion, we use "superior court" in referring to the earlier action and "trial court" in referring to the present action.

4 The list of alter egos was as follows: (1) Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl); (2) G.M.F.C., Inc.; (3) Gloria Marshall Salon of Torrance; (4) Redfield Taylor Associates, Inc.; (5) Gloria Marshall of Utah, Inc.; (6) Gloria Marshall International, Inc.; (7) Gloria Marshall Figure Salons of Australia Pty. Ltd.; (8) G.M.F.C. (Aust.) Pty. Ltd.; and (9) International Health Industries Ohio, Inc.

same day, the clerk of the court mailed to counsel a notice of entry of judgment.[5] On May 1, 1998, the alter ego parties, including Sarno, appealed from the judgment. The State moved to dismiss the appeals as untimely. Opposition was filed. On July 8, 1998, we granted the motion to dismiss (B122092). We later denied a petition for rehearing. On October 21, 1998, the California Supreme Court denied a petition for review (S072677).

On December 21, 1998, Sarno and four of her companies (collectively the "Sarno parties") brought this action to set aside the judgment.[6] On January 11, 1999, a first amended complaint was filed, naming as defendants the State, the People of the State of California, the County of Los Angeles, and the Los Angeles County Sheriff's Department (collectively the "State"). The Sarno parties alleged that the prior judgment was void under the state and federal due process clauses (Cal. Const., art. I §7, subd. (a); U.S. Const., Amend. XIV) because the superior court lacked personal jurisdiction over them. In that regard, they further alleged that, in the earlier action, they were not served with summons, given an opportunity to be heard, permitted to have counsel to defend their interests, or allowed to be present during the trial.

On January 13, 1999, the State filed a demurrer, asserting that the action was barred by, among other things, the doctrine of res judicata. The State also contended that the action constituted an improper collateral attack on the prior judgment inasmuch as the complaint failed to seek relief on the grounds of extrinsic fraud or mistake. Opposition was filed. By order dated February 1, 1999, the trial court sustained the demurrer

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5 Attorney Fraser claims that he did not receive the notice.

6 The four businesses were among the entities named in the superior court's statement of decision and the judgment, to wit: G.M.F.C., Inc.; Gloria Marshall Salon of Torrance; Gloria Marshall Salons of Australia Pty. Ltd.; and G.M.F.C. (Aust.) Pty. Ltd. (See fn. 4, *ante*.)

without leave to amend. On March 2, 1999, the action was dismissed with prejudice. A timely appeal followed.

## DISCUSSION

Code of Civil Procedure section 187 provides: "When jurisdiction is, by the Constitution, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

"A trial court has the authority to amend a judgment in order to add additional judgment debtors. Code of Civil Procedure section 187 has often served as the basis for such an amendment of a judgment, pursuant to the alter ego doctrine....And, the general rule is that `a court may amend its judgment at any time so that the judgment will properly designate the real defendants.'" (*Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 148-149, citations omitted.)

"Judgments are often amended to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor....This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant....`Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.'...In other words, `[i]f the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of

the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.'" (*NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778, citations omitted.)

In the prior action, the superior court stated: "[T]hree key factors – control of the litigation, a vigorous defense, and a similarity of interests between the named defendants and the alter ego – overlap each other. Applying them to the present case strongly tips the balance for allowing an amendment of the judgment against the named defendants to include as alter egos [the Sarno parties]."[7]

In its statement of decision, the superior court provided a lengthy discussion of the alter ego issue and the three "key" factors. That discussion is so detailed that we find it difficult even to summarize. Nevertheless, suffice it to say that evidence concerning the (1) payment of legal fees, (2) use of joint counsel (Nelson & Nelson), and (3) trial strategy established that the Sarno parties had the requisite control of the litigation. As to the nature of the defense, the "the named defendants...fully litigated [the] issues relating to both liability and alter ego." (Underscoring in original.)

Finally, with respect to the similarity of interests between the named defendants and the Sarno parties, the trial court stated: "What makes this trial distinguishable from virtually every reported decision on amending judgments to include alter egos is that both counsel were allowed by the court to present evidence at trial on not just liability, but alter ego issues as well. Mrs. Sarno, for instance, was called as a witness by both sides. Had the alter egos been allowed to participate directly, the alter egos could not have produced any evidence that would have affected the outcome of the trial. Certainly,

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[7] Technically speaking, the trial court did not "amend" the judgment. The Sarno parties were named as judgment debtors in the original (and only) judgment.

through the person of Mrs. Sarno, as examined by her long-time counsel, she had the opportunity to do so."

On appeal, the Sarno parties assert that they did not receive adequate notice or a meaningful opportunity to be heard on the alter ego issue. That assertion borders on the absurd. During two years of discovery, the State gathered evidence on the existence and identity of alter egos. In response, the named defendants and the Sarno parties – all represented by the same attorney (Fraser) – attempted unsuccessfully to block the discovery.[8]

Further, in an October 1996 letter – more than five months before trial – Fraser acknowledged that "[w]ith respect to the single enterprise theory, [the State] would have to prove that the *other Gloria Marshall entities* benefitted from the monies taken in by [FBS, Inc.]...." (Italics added) Plainly, Fraser knew which entities were at the center of the dispute. Indeed, before trial, he brought an in limine motion to preclude "evidence concerning alleged `alter ego' relationships between defendants FBS, Inc., Mark Bergendahl and Kellee Bergendahl...[and] *nine separate non-party* individuals and corporations...." (Italics added.) And, like the State, the Sarno parties were allowed to present evidence at trial on the alter ego issue.[9]

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8 As the superior court observed: "[The State] had sought throughout the course of its discovery efforts to uncover sufficient evidence to name Mrs. Sarno and her enterprises as alter egos. When Mark Bergendahl, Kellee Bergendahl, and Gloria Sarno all failed to show up for their individually scheduled depositions at the end of 1996, [the State] immediately sought an order from this court to compel their attendance."

9 The Sarno parties repeatedly claim that the State never filed a motion to add them to the complaint. Yet, they acknowledge in their opening brief that such a motion was filed on or about March 6, 1997. Also, the Sarno parties point out that they were not added as judgment debtors

The present case is strikingly similar to *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54. There, a jury returned a verdict against San Francisco Dairy Company, and the plaintiff successfully moved to add "Dairy Delivery Company, Inc." as a judgment debtor. Dairy Delivery Company appealed, and the Court of Appeal affirmed, stating:

"Appellant herein contends that the order...whereby [it was] added to the judgment, is in excess of the superior court's jurisdiction; that it is void for want of jurisdiction of said court over the appellant herein; that said order and the refusal of the superior court to set the same aside was a denial of due process of law to appellant and violative of the Fourteenth Amendment to the Constitution of the United States; and that the addition of the words `Dairy Delivery Company, Inc., a corporation' to the judgment is not in conformity with the verdict nor supported by the pleadings or issues. [The plaintiff], on the other hand, contends that by virtue of the inherent authority of a court to make its records speak the truth, the superior court had jurisdiction to amend the judgment because the evidence herein clearly showed....that `...San Francisco Dairy Company was merely the *alter ego* of the Dairy Delivery Company'; hence that the amendment did not add a new defendant to the judgment, but merely set forth the correct name of the real defendant.

"....

"...The rule has long been declared in California that where the facts warrant, courts may amend pleadings to correctly designate the parties actually involved....The basis of the rule is, of course, that the court having acquired jurisdiction of the person of the defendant and of the subject of the action, it necessarily possessed the power to correct a misnomer....Where,...as here,...the evidence is sufficient to

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*post*judgment but were included in the original judgment. We find that distinction to be of no significance.

warrant the conclusion that in effect the two corporations are identical; where, as here, the action was fully and fairly tried with at least the direct financial assistance of appellant; and where, as here, nothing appears in the record to show that Dairy Delivery Company could have produced a scintilla of evidence that would have in any way affected the results of the trial, there is no basis for a different rule. The trial court having acquired jurisdiction of San Francisco Dairy Company must likewise be held to have acquired jurisdiction of its alter ego, the appellant herein. To hold otherwise upon the facts herein would be to deny [the plaintiff] the fruits of fairly contested litigation, place a premium upon acts and conduct which have misled a litigant, and frustrate the very purpose of our jurisprudence." (8 Cal.App.2d at pp. 57-60, quoted with approval in *Ukegawa Brothers v. Agricultural Labor Relations Bd.* (1989) 212 Cal.App.3d 1314, 1323-1324)

Moreover, by including the Sarno parties in the judgment, the superior court necessarily found that it had personal jurisdiction over them. (See Code Civ. Proc., §187.) That conclusion was based on evidence regarding alter egos which the trial court permitted the parties to introduce. It follows that the issue of personal jurisdiction was adjudicated in favor of the State. Having failed to challenge that determination in the earlier action, the Sarno parties are precluded from doing so now. As Witkin explains:

"Suppose a final decision on jurisdiction has been made by a decision of the lower tribunal in favor of its jurisdiction, and the objecting party either has failed to seek a review of the determination by motion or appeal or otherwise, or has had such a review and the reviewing court has upheld the determination. If the matter involved is jurisdiction of the person, when the determination becomes final it may be res judicata and no longer subject to attack, even though demonstrably wrong. The same reasons for application of the doctrine of res judicata apply here as in cases involving final determinations of substantive rights and liabilities. And, since

jurisdiction of the person can be conferred by mere consent on a court which otherwise have no such jurisdiction, it is not too great an additional step to hold that a party who litigates the question may be bound by the final determination of the court." (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 335, p. 922, italics added, original italics omitted.)

In sum, we conclude that the Sarno parties received adequate notice and an opportunity to be heard on the alter ego issue.[10] Moreover, assuming that the superior court erred in finding that it had jurisdiction over the Sarno parties, they should have challenged that determination by way of appeal, not by making a collateral attack in a subsequent action.

DISPOSITION

The order of dismissal is affirmed

NOT TO BE PUBLISHED.

MASTERSON, J.

We concur:

SPENCER, P.J.
ORTEGA, J.

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10 Thus, the present case is distinguishable from *Nelson v Adams USA, Inc.* (Apr. 25, 2000, No. 99-502) ___ U.S. ___ [2000 WL 459282].

FILED
LOS ANGELES SUPERIOR COURT
MAR 2, 1999
JOHN A. CLARKE, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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|---|---|
| GLORIA SARNO aka Gloria Marshall, aka Gloria Bergendahl, an individual; G.M.F.C., a California corporation; GLORIA MARSHALL SALON OF TORRANCE, a California general partnership; GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA PTY. LTD., an Australian corporation; and G.M.F.C. (Aust.) PTY. LTD., an Australian Corporation,<br><br>Plaintiffs,<br><br>STATE OF CALIFORNIA, a public entity; COUNTY OF LOS ANGELES, a public entity; PEOPLE OF THE STATE OF CALIFORNIA; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; and DOES 1 through 5, inclusive,<br><br>Defendants. | CASE NO. BC 202 691<br><br>ORDER DISMISSING ACTION WITH PREJUDICE<br><br>Hon. Richard Kalustian<br><br>Dept: 17<br>Date: January 29, 1999<br>Time: 8:45 a.m.<br>Date Action Filed: 12/21/98<br>Trial Date: None Set |

This Court, having issued an Order Sustaining Demurrer Without Leave to Amend on February 8, 1999, IT IS HEREBY

ORDERED:

The above-captioned action is dismissed with prejudice.

Dated: 3/2/99

(signature)

_____

JUDGE OF THE SUPERIOR COURT

FILED FEBRUARY 8, 1999

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

| | |
|---|---|
| GLORIA SARNO aka Gloria Marshall, aka Gloria Bergendahl, an individual; G.M.F.C., a California corporation; GLORIA MARSHALL SALON OF TORRANCE, a California general partnership; GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA PTY. LTD., an Australian corporation; and G.M.F.C. (Aust.) PTY. LTD., an Australian Corporation,<br><br>Plaintiffs,<br><br>STATE OF CALIFORNIA, a public entity; COUNTY OF LOS ANGELES, a public entity; PEOPLE OF THE STATE OF CALIFORNIA; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; and DOES 1 through 5, inclusive,<br><br>Defendants. | CASE NO. BC 202 691<br><br>ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND<br><br>Hon. Richard Kalustian<br><br>Dept: 17<br>Date: January 29, 1999<br>Time: 8:45 a.m.<br>Date Action Filed: 12/21/98<br>Trial Date: None Set |

The demurrer of Defendant, the People of the State of California, to the First Amended Complaint on file herein came on regularly for hearing before the undersigned on January 29,

1999, upon notice duly and regularly served, Plaintiffs, Gloria Sarno, G.M.F.C., Gloria Marshall Salon of Torrance, Gloria Marshall Figure Salons of Australia Pty. Ltd., and G.M.F.C. (Aust.) Pty. Ltd., appearing by their attorney, Richard E. Eldred, and Defendant, the People of the State of California, appearing by its attorneys, Jerry Smilowitz, Deputy Attorney General, and Dana Aratani, Deputy District Attorney of Los Angeles County, and the matter having been presented, argued and submitted and good cause appearing therefor,

IT IS HEREBY ORDERED THAT the demurrer to the Complaint be and the same is hereby sustained without leave to amend on the following grounds:

1. The Complaint fails to state facts sufficient to constitute a cause of action in that the action is barred by an affirmative defense, namely, res judicata.

2. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead that the grounds for relief is either extrinsic fraud or mistake. In light of the record before the court, the Complaint cannot be amended to do so.

3. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead the absence of any remedy at law. In light of the record before the court, the Complaint cannot be amended to do so.

Dated: 2/8/99

/s/

JUDGE OF THE SUPERIOR COURT

Second Appellate District, Division One - No. B122092
S072677

IN THE SUPREME COURT OF CALIFORNIA

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THE PEOPLE, Respondent

v.

GLORIA MARSHALL AMERICA INCORPORATED, et al.,
Appellants

---

Appellant's petition for review DENIED.

SUPREME COURT
FILED
OCT 21 1998

_____
Deputy

GEORGE
_____
Chief Justice

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; KELLEE BERGENDAHL, Defendants and Appellants | No. B122092<br>(Super. Ct. No. BC121888)<br>Los Angeles County<br>ORDER<br>COURT OF APPEAL - SECOND DISTRICT FILED July 8, 1998 JOSEPH A. LANE Clerk C. Hon Deputy Clerk |

Respondent's motions to dismiss are granted.

The notices of appeals filed April 29, 1998 and May 1, 1998 are hereby dismissed as untimely.

SPENCER, P.J. ORTEGA, J. VOGEL (M), J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

02/24/98 DEPT. 44

HONORABLE REGINALD A. DUNN , JUDGE
D. LARSON DEPUTY CLERK

HONORABLE JUDGE PRO TEM

ELECTRONIC RECORDING MONITORED, REPORTER NONE

L. MITCHELL, CSL Deputy Sheriff

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BC121888 Plaintiff
Counsel

PEOPLE OF THE STATE OF CALF

VS

Defendant NON
GLORIA MARSHALL AMERICA, INC. APPEARANCE
Counsel

---

NATURE OF PROCEEDINGS:

NOTICE OF SIGNING/FILING/ENTRY OF JUDGMENT

The Court having carefully read and considered the Objection by Defendants filed December 17, 1997, the Responses to Objections by Plaintiff filed February 19, 1998, and the Final Judgment lodged with the Court on December 2, 1997, now signs the Final Judgment as submitted.

Final Judgment is filed and entered this date.

Copy of this Minute Order is forwarded via U.S. Mail this date

to:

JERRY SMILOWITZ, DAG
ATTORNEY GENERAL'S OFFICE
300 S. SPRING ST., STE 5 NORTH
LOS ANGELES, CA 90013

STUART LYTTON, DDA
DANA ARATANI, DDA
DISTRICT ATTORNEY'S OFFICE
201 N. FIGUEROA ST., 16TH FLR.
LOS ANGELES, CA 90012

E. SCOTT FRASER, ESQ.
NELSON & NELSON
2029 CENTURY PARK EAST, STE 2700
LOS ANGELES, CA 90067-3214

MINUTES ENTERED

02/24/98

PAGE 1 OF 1 DEPT. 44

COUNTY CLERK

Filed 2/24/98

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) No. BC 121888 |
| | ) FINAL JUDGMENT |
| Plaintiff, | ) [Honorable Reginald A. Dunn] |
| v. | ) Dept.: 44 |
| GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; KELLEE BERGENDAHL, | ) |
| Defendants. | ) |

The above-entitled cause came on regularly for trial on August 7, 1997 in Department 44 of the above-entitled Court, the Honorable Reginald A. Dunn presiding without a jury, and was tried on that date through June 20, 1997. Plaintiff appeared by his attorneys, Jerry Smilowitz, Deputy Attorney General, Stuart Lytton, Deputy District Attorney, and Dana Aratani, Deputy District Attorney. Defendant appeared by his attorneys, Nelson & Nelson, by E. Scott Fraser, Esq., and Robert Sainberg, Esq. Following receipt of oral and documentary evidence the cause was argued and submitted for decision, and the Court having caused to be made and filed herein its written statement of decision,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff, having met its burden o f proving by a

preponderance of the evidence that defendants violated various provisions of the Contracts for Health Studio Services Act (Civ. Code §§ 1812.80 et seq.) As well as having engaged in other acts of unfair competition in violation of Business and Professions Code section 17200, as set forth by plaintiff in paragraphs 11(A) through 11(L) of the First Cause of Action in its First Amended Complaint, with the exception of paragraphs 11(B) and (J) which this Court has dismissed pursuant to plaintiff's request, judgment on the allegations set forth in the remaining allegations of the First Cause of Action in the First Amended Complaint is granted in favor of plaintiff.

2. Plaintiff, having met its burden of proving by a preponderance of the evidence that defendants, in the sale of goods and services, made statements by way of written advertisements which they knew or should have known to be untrue, deceptive, or misleading in violation of Business and Professions section 17500, as alleged in the Second Cause of Action in its First Amended Complaint, judgment on the allegations set forth in the Second Cause of Action is granted in favor of plaintiff.

3. The Court finds that plaintiff has met its burden of proving by a preponderance of the evidence that certain business entities - G.M.F.C., Inc., Gloria Marshall Salon of Torrance, Redfield Taylor Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., Gloria Marshall Figure Salons of Australia Pty. Ltd., G.M.F.C. (Aust.) Pty. Ltd., International Health Industries Ohio, Inc. - and an individual, Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl) were the alter egos of the named defendants, and that there existed such a unity of ownership and interest between the above-named business entities and Gloria Sarno, on the one hand, and the named defendants, on the other, that they all formed a single or unitary enterprise in committing those acts, practices, and representations alleged in plaintiff's First and Second Causes of Action in its First Amended Complaint. Accordingly, the Court grants judgment on both causes of action against the above-named business entities and Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl) in favor of plaintiff.

4. Pursuant to Business and Professions Code sections 17206 and 17536, Gloria Marshall America, Inc., FBS, Inc., Mark Bergendahl, Kellee Bergendahl, Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl), G.M.F.C., Inc., Gloria Marshall Salon of Torrance, Redfield Taylor Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., Gloria Marshall Figure Salons of Australia Pty. Ltd., G.M.F.C. (Aust.) Pty. Ltd., and International Health Industries Ohio, Inc. (hereafter, all of those business entities, Mark Bergendahl, Kellee Bergendahl, and Gloria Sarno shall be collectively be identified as "defendants"), on a joint and severable basis, shall pay to plaintiff civil penalties in the amount of two hundred thousand dollars ($200,000).

5. Pursuant to Business and Professions Code sections 17203 and 17535, defendants, on a joint and severable basis, shall set up a restitution fund in the amount of two hundred thousand dollars from which they shall make payment to the following:

A. All persons entitled to refunds as the result of salon closures who had received a partial refund based upon pro rata usage. Such refunds shall be based upon actual usage;

B. All persons entitled to refunds as the result of salon closures who have not received any payment from defendants. Such refunds shall be based upon actual usage;

C. Beatrice Baca, in the amount of four hundred eighty dollars ($480);

D. Patricia Haro, in the amount of four hundred dollars ($800).

One hundred twenty (120) days following entry of this Final Judgment, defendants shall present to the Court a list setting forth the names of persons to whom refunds have been made, and the amount of refund made to each. Thereafter,

upon further order of this Court, any remaining moneys remaining the restitution fund shall revert to defendants.

6. Costs are awarded to plaintiff in the amount of $18,601.40. Defendants on a joint and severable basis, shall pay this amount to plaintiff.

7. The Court finds that this is an appropriate case for the issuance of a permanent injunction, and good cause appearing, the Court issues the following:

PERMANENT INJUNCTION

That the injunctive provisions of this judgment are applicable to the offering of health studio services including but not limited to instruction, training or assistance in physical culture, body building, exercising, weight reduction, diet control, figure development, or any other such physical skill, or for the use by an individual patron of the facilities of a health studio, gymnasium, figure salon or other such facility used for any of the above purposes, or for membership in any group, club association, salon or organization formed for any of the above purposes by defendants, and in connection therewith, to the principals, officers, directors, employees, agents, licensees, representatives, successors and assigns of defendants, and to all persons, partnerships, corporations, and other entities, acting for, through or on behalf of, or in concert or participation with defendants who have actual or constructive knowledge of this Judgment.

Pursuant to Business and Professions Code Sections 17200, 17203, 17500, 17535 defendants are from the date of entry of this judgment permanently enjoined and restrained from, directly or indirectly, engaging in the following acts or practices in connection with any matter related to health studio services:

A. Failing to make pro rata refunds, based upon the patron's actual usage of health studio services, if a health studio closes.

B. Providing a contract to a patron for health studio services, with provisions for the relief of payment for services to occur in the event the patron moves further than 25 miles from the health studio, and such patron is unable to transfer the contract to a comparable facility, that requires that patron to submit a computer generated utility bill with her name at the new address or requires her to acquire and submit any other documentation evidencing such move - unless defendants prorate the amount of the refund from the date of her move.

C. Inserting a clause in a health studio services contract with a provision for the relief of payment for services, to occur in the event that a patron moves further than 25 miles from the health studio, and such patron is unable to transfer the contract to a comparable facility, that such person may be charged by a predetermined fee, unless defendants further disclose that the fee may not exceed one hundred dollars ($100), or, if more than half the life of the contract has expired, such person may be charged a predetermined fee not exceeding fifty dollars ($50), in violation of Civil Code section 1812.89(b)(2).

D. Provide contracts to patrons for health studio services that:

(i) Offer for sale the Gloria Marshall Quick Trim Menu Plan, Strategy Planner, Quick Trim Meal Replacement, or any related or similar products and make said products non-refundable, in violation of Civil Code sections 1812.85(b)(4), 1812.89(a)(1), 1812.89(a)(2) and 1812.89(b)(1). Defendants shall have no obligations to issue a refund for the Quick Trim Meal Replacement if the packaging has been open, torn or damaged, or otherwise shows any sign of tampering or adulteration. Defendants may not deduct from any refund a purported cost for the

Gloria Marshall Quick Trim Menu Plan, Strategy Planner, or any other related or similar products for which a patron has not paid any money under her contract.

(ii) Require patrons to pay a surcharge for using a credit card in lieu of payment by cash, check, or similar means, in violation of Civil Code section 1748.1(a).

(iii) Impose a twenty-five dollar ($25) administrative fee, in violation of Civil Code Sections 1812.85(b)(1) and 1812.85(b)(4), if a patron exercises her three-day right to rescind or cancel the contract.

(iv) Require a patron to include a copy of her contract along with a notice of cancellation, in violation of Civil Code §1812.85(b)(1).

(v) Include a definition of disability other the definition set forth in Civil Code section 1812.89(a)(3), or create any procedure or formula for calculation of refunds, in violation of Civil Code section 1812.89(a)(2), that obligates a patron who has a physical or mental impairment that prevents her from using the services to pay for the missed services, or denies a refund to a patron for that period of time that she was physically or mentally impaired.

(vi) Impose a twenty-five dollars ($25) administrative fee on refunds to those patrons or their estates who are unable to use the health studio services because of death or disability, in violation of Civil Code section 1812.89(a)(2).

E. Subtracting any amount from a refund unless

specifically permitted to do so pursuant to Civil Code section 1812.80 et seq.

F. Selling any pre-packaged food, drink, meal replacement or any other food, drink, or dietary supplement unless the patron is informed in her contract that she is not required to purchase the food or drink or dietary supplement.

G. Advertising or other representing the price of a session for health studio services in any manner other than stating the price of a one-hour session.

H. Offering a contract for health studio services that obligates a person to pay one thousand dollars ($1,000), exclusive of interest and finance charges. For purposes of this paragraph, all contracts for health studio services, which may be in effect between defendants and the same buyer, the terms of which overlap for any period, shall be considered as one contract.

I. Making any oral, visual or written representation, in connection with the offering of health studio services, that states or implies that patrons will lose, or lose up to, a specific number of inches or pounds, unless defendants maintain a comprehensive survey that substantiates the weight or inches reduction representations;

J. Making any oral, visual, or written representation, in connection with the offering of health studio services, that states or implies that a particular patron or patrons lost specific numbers of inches or pounds unless defendants and others disclose clearly and conspicuously that the weight or inches lost by those patron or patrons is not what consumers should expect to experience.

K. Making any oral, visual or written representations, in connection with the offering of health

studio services, that states or implies that results are guaranteed unless defendants and others disclose clearly, adequately, and accurately in immediate conjunction therewith:

4. The nature and extent of the guarantee;
5. The conditions and limitations on the guarantee;
6. Which programs are guaranteed
7. The duration of the guarantee
8. The manner in which defendants will perform

L. Selling the Quick Trim Meal Replacement or any related or similar product, if defendants and others make any oral, visual, or written representations, in connection with the offering of health studio services, that there are no pre-packaged foods or no pre-packaged foods offered or required for a patron's participation in the health studio's weight reduction services.

M. Requiring payment for a minimum or specific number of sessions for health studio services unless the sessions offered represent the total sessions necessary for a patron to achieve her goal weight.

Dated: February 24, 1998

/s/

HONORABLE REGINALD DUNN
Judge of the Superior Court

5/20/98 Costs affixed per Memo of Costs filed 3/5/98, D. Larson Clerk Deputy

Filed 10/30/97
John A. Clarke, Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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| PEOPLE OF THE STATE OF CALIFORNIA<br><br>PLAINTIFF,<br><br>v.<br><br>GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; KELLEE BERGENDAHL; and DOES 1 through 20, inclusive,<br><br>DEFENDANTS. | Case No. BC 121888<br><br>STATEMENT OF DECISION |

The above-entitled cause came on regularly for trial on April 7, 1997 in Department 44 of the above-entitled Court, the Honorable Reginald A. Dunn presiding without a jury, and was tried on that date through June 20, 1997.

Following receipt of oral and documentary evidence the cause was argued and submitted. The Court having considered the evidence as well as arguments of counsel now issues the following statement of intended decision.

Plaintiff has stated two separate causes of action alleging acts of unfair competition in violation of Business and Professions Code section 17200 and making untrue or misleading statements in order to sell goods or services in violation of Business and Professions Code section 17500. Additionally Plaintiff has argued that the evidence requires that other business entities should share in the liability of the named defendants on a theory of single or

unitary enterprise.

FIRST CAUSE OF ACTION

Business and professions Code section 17200 defines unfair competition to include any "...unlawful, unfair or fraudulent business act, practice or unfair, deceptive, untrue or misleading advertising or any act prohibited by Chapter 1 of part 3 of division 7 of the Business and Professions Code. These sections are directed at and encompass violations of statutory and regulatory law constituting unfair competition and unfair business practices not addressed specifically by statute including business practices which offend public policy or are unethical, oppressive, or substantially injurious to customers.

It has been alleged and proved by a preponderance of the evidence that defendants violated various provisions of the Contracts for Health Studio Services Act (Civil Code §§ 1812.80 et seq.) As well as having engaged in other acts of unfair competition, as set forth by plaintiff in paragraphs 11(A) through 11(L) of the First Cause of Action in its First Amended Complaint, with the exception of paragraphs 11(B) and 11(J), which this court has dismissed pursuant to plaintiff's request. Accordingly, the Court finds for plaintiff and against defendants GMA, Inc., Mark Bergendahl and Kellee Bergendahl on the First Cause of Action.

SECOND CAUSE OF ACTION

Plaintiff has alleged and proved by a preponderance of the evidence that the defendants, in the sale of goods and services, made statements by way of written advertisements which they knew or should have known to be untrue, deceptive or misleading in violation of Business and Professions Code section 17500. Accordingly, the Court finds for the plaintiff and against defendants GMA, Inc., Mark Bergendahl and Kellee Bergendahl on the Second Cause of Action.

ALTER EGO/SINGLE ENTERPRISE

In ruling on the Plaintiff's allegations that the facts of this case require that other business entities should share in the liability of the named defendants under a theory of single or unitary enterprise the Court adopts as its own the Plaintiff's statement of intended decision as modified below.

The theory of single or unitary enterprise or alter ego theory is normally applied to parent-subsidiary corporate relationships; however, where the facts require, it has been extended to include sister companies. The theory has been described as follows: "In effect what happens is that the court for sufficient reason, has determined that though there are two or major personalities, there is but one certain component elements of it. The Court thus has constructed for the purposes of imposing liability, an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of birth, and charged it with the liabilities of both." Las Palmas Associates v. Las Palmas Center Associates 235 Cal.App.3d 1220.

The rationale for applying a single enterprise theory is stated succinctly:

"Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. Nevertheless, it would be unjust to permit those who control companies to treat them as a single or unity enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity." Id. at 1249.

The Las Palmas court noted that one key factor is whether one business made loan guaranties to the other. In Roman Catholic Archbishop v. Superior Court (1971) 15 Cal.App.3d 405, 411, the Court emphasized that "(a)mong the factors to be considered in applying the doctrine are ... holding out by one entity that is liable for the debts of the other ..." No single factor is dispositive. As the

California Supreme Court stated in Mesler v. Bragg Management Co. (1985) 39 Cal.3d 290, 306: "There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are nevertheless, two general requirements: (1) `that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.'" (Citation omitted) In Associated Vendors Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 842, the court expanded on this latter prong:

"The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable, under the applicable rule and cited, for the equitable owner of a corporation to hid behind its corporate veil."

Numerous factors can singly, or in conjunction with each other, establish an alter ego relationship. Associated Vendors, supra, 210 Cal.App.2d at 838-840 lists over two dozen, many of which apply here: "... the holding out by an individual that he is personally liable for the debts of the corporation; ... the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities ...; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family ...; ... the use of the same office or business location; the employment of the same employees and/or attorney ...; ... the failure to adequately capitalize a corporation ...; ... the disregard of legal formalities and the failure to maintain arm's length relationships among related entities ...; ... the use of the corporate entity to procure labor, services or merchandise for another person or entity; ... the diversion of assets from a corporation by a stockholder or other person or entity, to the detriment of creditors,

or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another ..." The application of "any of these factors, as well as the consideration of any other circumstances which would have warranted the trier of fact to disregard the corporate entity, were within the province of the trial court." Id. at 840.

Plaintiff has submitted numerous factors to establish an alter ego relationship. These factors include the following:

Defendants Mark Bergendahl and Kellee Bergendahl are married, and have been since the 1980's. Gloria Sarno is the mother of Mark Bergendahl. Gloria Sarno is married to Ron Sarno.

Mark Bergendahl is president of Jacobson Larson. During the period of 1990 to 1994, Mark Bergendahl was vice president of GMFC, an overseas direction for GM Australia. During this time, he was also president and partial shareholder of GMA, Gloria Marshall International, and Redfield Taylor and Associates. Mark Bergendahl was also president and partial shareholder of GM Utah and International Health Industries of Ohio.

Kellee Bergendahl was the vice president and partial shareholder of GMA, GM Utah and International Health Industries of Ohio.

Gloria Sarno is and was the president and sole shareholder of GMFC, Inc. She was also a partner in GM Torrance, with her husband, Ron Sarno. Gloria Sarno is also an overseas director of Gloria Marshall Figure Salons of Australis Party Limited. She is the actual Gloria Marshall whose name and pictures appear in various advertisements. Presently, Gloria Sarno is the sole shareholder of Jacobson Larson. According to Gloria Sarno, Jacobson Larson provides management services to GM Australia. Previous, GMFC provided those services. (See "Management Agreements" below.) Mark Bergendahl participated in the financial aspects of the management contract. Gloria Sarno is in the process of moving the management operation to Australia.

Gloria Sarno testified that Mark Bergendahl, as president of Jacobson Larson, never received payment for his services. Yet, Mark Bergendahl testified that he earned $120,000 last year from Jacobson Larson.

GMA had three different addresses at various times. Exhibit 1 shows that corporate addresses were at: (1) 6615 East Pacific Coast Highway, Long Beach, California for the period of 1987 to July 30, 1990, (1) 3020 Old Ranch Parkway, Suite 410, Seal Beach, California for the period of August 1, 1990 to October 31, 1994, and (3) 7755 Center Avenue, Suite 600, Huntington Beach, California for the period of November 1, 1994 to the present. Exhibit 2 shows that GMFC had the exact same corporate addresses, at the exact times, as GMA.

Additionally, other Gloria Marshall entities were located at these same offices at the same time (while they existed). These included: GM International, GM Utah, and International Health Industries of Ohio (GM Ohio). It is apparent that GM Torrance employees took place at these offices. Additionally, Jack Perkins testified that his meeting with Mark Bergendahl, Gloria Sarno and Patricia Townsend would take place at either the Long Beach or Seal Beach corporate office, depending on the time frame. The advertising issues that were discussed included all of the California salons, as well as the advertising for the Australian salons.

A review of the office layouts of the locations (Exhibits 373 to 375) reflect the sharing of many common areas within the suite. There was one reception area, a lunch room, and a single conference room. The suite, according to Mark Bergendahl, would only identify one business on the door. Within the office, there were no signs identifying separate entities. In the reception area, an employee would be stationed presumably to greet visitors. Mark Bergendahl did not know who paid this employee. Exhibit 373 depicts the Seal Beach location. It shows where the principals and employees worked within the office

suite, along with what entity Mark Bergendahl testified such principals and employees were connected.

Within the entities moved from one office location to another, they would all move together. Mark Bergendahl did not know who paid for the move. GMFC paid the lease while GMA and the other entities were located in the office suite. GMA never reimbursed GMFC for the lease payments.

Page 00124 of Exhibit 193 shows a letter, dated November 10, 1988, with GMFC letter head signed by Marcia Davis, identified as Director of Special Projects, Also shown on that page is a business card of Marcia Davis with the same title. The card stated "Gloria Marshall Figure Salons Pty. Ltd." and also states "International Headquarters," along with the Long Beach address. (See the Long Beach address shown in Exhibits 1 and 2.) When asked about this card, Mark Bergendahl admitted that it was an Australian Company due to the "Pty. Ltd." designation.

Additionally, Exhibit 238, page "plfs - 4-A" shows a business card that was given to Patron Mary Sullivan when she sued defendants in small claims court. This card was given by Ann Beasley in 1995 and identifies her as Director of Field Operations for Gloria Marshall International, Inc., with the National Headquarters (emphasis added) at 7755 Center Ave., Suite 600, Huntington Beach, California 92647.

Exhibit 8, page 5, shows that G.M.F.C., Inc. was created "(p)rimarily to establish and operate figure control salons for women." There is no evidence to show that this purpose has changes in the corporate records kept by the Secretary of State. Indeed, page 3 of Exhibit 8, shows a document with a wording at the bottom of the page stating: "I declare there has been no change in the information contained in the last statement of corporation which is on file in the Secretary of State's Office." Beneath this wording is the signature of Gloria Bergendahl, dated December 31, 1990.

Additionally, Mark Bergendahl admitted that he though that GMFC may have meant "Gloria Marshall Figure Control." Jack Perkins also testified that he thought that GMFC meant "Gloria Marshall Figure Control."

Gloria Sarno testified that, in the 1960's, she and her first husband, Allen Bergendahl, created Gloria Marshall Figure Salons. Gloria Sarno owned the trade name Gloria Marshall, and authorized the use of the trade name to other corporations that owned and operated Gloria Marshall Figure Salons.

Between 1966 and 1982, ten separate corporations located at the same corporate headquarters in Downey managed all of the Gloria Marshall salons located throughout the United States. Allen Bergendahl had a proprietary interest in all ten corporations. During those years, GMFC, Inc., owned and operated Gloria Marshall Figure Salons from the Downey location. Gloria licensed GMFC, Inc., to use the trade name "Gloria Marshall".

International Services Industries, Inc., (hereinafter "ISI"), owned by Allen Bergendahl and Sid Craig, was a Utah Corporation with its principal place of business located in Downey. However, Gloria Sarno believed that ISI was an Ohio Corporation. ISI owned and operated Gloria Marshall Figure Salons.

According to Mark Bergendahl, GMFC loaned GMA a significant amount of money. To ensure repayment of this money, GMFC and GMA entered into an agreement to allow GMFC to collect the installment payments directly from a patron. This was accomplished through the ACH (automated clearing house) system. The ACH system allows a company to go directly into the personal bank account of a customer or patron and collect the money that is due to the company. Since GMFC did not have its own ACH system, GM Torrance performed the ACH function on behalf of GMFC. Exhibit 370 shows this relationship. The agreement was not in writing.

Kimberly Saalfeld also testified to this arrangement. She was shown page 14 of Exhibit 307 (the GMA general ledger for January 1993) and asked to look at the entry at the bottom of the page with the description "ACH collected by GMT/GMFC," with the amount of $51,182.85 (account number 1201 - Account Receivable - GMFC"). Kim Saalfeld noted that this represented the amount collected by GMT/GMFC under the ACH arrangement for January 1993. This entry was entered in the same way on a monthly basis using account number 1201, titled "Accounts Receivable - GMFC" with the description "ACH collected by GMT/GMFC." A summary of the amounts shown in the general ledgers is as follows (NOTE- this list included only those amounts that fit the transaction description above, i.e., account number the same, account title the same, and description the same):

1993:

| | | |
|---|---|---|
| January | $ 51,182.85 | Exhibit 307, page 14 |
| February | 52,166.25 | Exhibit 308, page 12 |
| March | 57,829.17 | Exhibit 309, page 15 |
| April | 64,595.17 | Exhibit 310, page 11 |
| May | 63,338.65 | Exhibit 311, page 9 |
| June | 72,650.25 | Exhibit 312, page 14 |
| August | 80,944.75 | Exhibit 314, page 14 |
| September | 82,342.25 | Exhibit 315, page15 |
| October | 77,591.55 | Exhibit 316, page 15 |
| November | 73,233.30 | Exhibit 317, page 15 |
| December | 71,008.76 | Exhibit 318, page 5 |

SUBTOTAL: $746,882.95

1994: (The description used in 1994 was "ACH collected by GMT")

| | | |
|---|---|---|
| April | $ 26,316.81 | Exhibit 322, page 2 |
| May | 11,945.88 | Exhibit 323, page 13 |
| June | 427.00 | Exhibit 324, page 3 |

| | | |
|---|---|---|
| July | 73.14 | Exhibit 325, page 3 |
| August | 100.00 | Exhibit 326, page 3 |
| September | 80.00 | Exhibit 327, page 3 |
| October | 73.00 | Exhibit 327, page 2 |
| November | 76.00 | Exhibit 328, page 2 |
| TOTAL: | $785,974.89 | |

Based on the description of the accounting entry by Kimberly Saalfeld, these are the amounts that were collected by GM Torrance on behalf of GMFC. The amounts that could be accounted for above are not inconsistent with the amount shown collected by GM Torrance/GMFC on Exhibit 370 ($1 million based on the testimony of Mark Bergendahl).

The ACH agreement essentially pulled at least $785,974.78 (probably closer to $1 million) from the collections of GMA, which in turn had come from GMA patrons. Yet, the installment payments from the patrons never touched a bank account of GMA. Instead, GMFC was guaranteed repayment of amounts it previously forwarded to GMA by extracting (through GM Torrance) amounts from GMA patron bank accounts. In effect this automatically prioritized GMFC above the patrons for payment should GMA fall into financial difficulties. Clearly the above amounts would have covered the refunds to GMA patrons as a result of the salon closures. However, the money ended up securely in the possession of GMFC. Gloria Sarno testified that she wanted this arrangement to insure repayment by GMA. Importantly, Mark Bergendahl himself testified that GMFC had never paid any refunds. As a result, GMFC benefitted at the expense of the GMA patrons.

The general ledgers of GMA and GM Torrance had an intercompany account for each of the other entities. These accounts were titled: "Intercompany - G.M.F.C.," Intercompany - Redfield Taylor," "Intercompany - G.M. Australia," etc. Examples of these accounts are shown on pages 7 to 9 of Exhibit 318. Each account has a beginning balance ("balance forward" from the last period), the transactions during the current period

(with a general ledger comment) and an ending balance.

The transactions during the current period reflect the activity for each respective month on the general ledger. Exhibit 318, the general ledgers pertain to December of 1993. As such, the transactions within a particular intercompany account show an alleged transfer of funds to or from that entity shown in the title of the intercompany account. Throughout the general ledgers, there are a significant number of entries between GMA and the other entities, as well as GM Torrance and the other entities. Due to the frequency and nature of these transactions, Dr. Stone formulated the opinion that the companies were not operating independently.

A review of the general ledgers of GMA (Exhibits 280 through 335) shows significant activity in the intercompany accounts of GMFC and GM Australia. In July 1991, the general ledgers showed a balance of $213,356.81 (Exhibit 286, page 3) in the Intercompany - GM Australia account. This amount falls to $3,448.81 in May 31, 1993, (Exhibit 309, page 16). The Intercompany - GMFC account showed even greater variation.

In July 1993, the Internal Revenue Service closed the GMA salons for nonpayment of taxes. Approximately $435,000 was owed to the IRS. To pay this amount GMA received $435,000 from GMFC, and in turn paid the IRS. The salons were quickly reopened. This amount was considered a loan by defendants. In Exhibit 270, there are two alleged loan agreements covering this amount. These loans were treated on the general ledgers of GMFC as follows: Exhibit 356, page 9, identifies: "loan receivable - GMA" with a beginning and ending balance for the fiscal year 3ending November 30, 1993. The beginning balance is $6,200 (the amount owed to GMFC by GMA). Later in that year an entry for $400,000 is added, which increases the amount owed by GMA to $406,200. Oddly enough, the date of the entry is January 4, 1996, more than two years after the end of the fiscal year. One other entry was made, adding $8,000 to the loan receivable amount. This was also a

late entry dated January 15, 1996. As such, prior to January 4, 1996, the general ledgers of GMFC reflected an ending balance in "loan receivable - GMA" of $6,200 at November 30, 1993. In other words, for more than two years after the close of the fiscal year, the general ledger of GMFC did not reflect an amount of $408,000 owed by GMA. These general ledgers were turned over to plaintiff only after a motion to compel and discovery hearing held on January 3, 1996.

Gloria Sarno testified as to this transaction. In July 1993, Mark Bergendahl requested money from Gloria Sarno to cover the IRS liability. Gloria Sarno then called GM Australia and instructed Dale Falconer, its president, to obtain a loan for $435,000 from its bank. GM Australis obtained the loan and transferred the money to GMFC. Subsequently, GMFC gave the money to GMA.

According to Gloria Sarno, Mark Bergendahl prepared the note for $435,000 (Exhibit 197, page 14) and rewrote the contract to reflect the actual amount of the loan for $450,000 (Exhibit 197, pages 15 to 16). Gloria Sarno did not participate in any negotiations in the formation of the pages 15 and 16. Also, she never enforced any provision of the loan agreement, stating that GMFC "wrote off the loan."

Dr. Ronald Stone, a financial expert called as a witness by the plaintiff, testified as to a write-off of management receivables of $153,000 from GM Australia that was due to GMA. This write-off is shown on Exhibit 318, page 9. These management fees receivables stayed on the ledgers of GMA throughout 1993 (January 1993 general ledger, Exhibit 307, page 16), thus indicating that such amount had been considered due for at least a year.

GMA appears to have borrowed significant sums from Gloria Sarno personally. (Exhibit 331, page 7.) Gloria Sarno testified that she personally co-signed a $775,000 bank loan to GMA. She is repaying the loan to the bank. There is no

evidence of written loan agreements between GMA and Gloria Sarno personally. Pursuant to plaintiff's discovery request, the only loan agreements received from defendants were those shown in Exhibit 270.

Exhibit 270, pages 4 to 14, purportedly represent loans from GMFC to GMA, Bob Barkatelly, the controller for GMFC and GMA, or her son Mark, Vice President of GMFC and President of GMA prepared the loan agreements. When asked, Gloria Sarno did not know the capacity of the person writing the agreements. Additionally, Gloria Sarno did not know the capacity of the person writing the agreements. Additionally, Gloria Sarno did not know that GMA sold its salon equipment to GM Utah or GM Ohio. (The loan document allows GMFC to obtain GMA equipment and other assets to protect the collateral of the loan.)

Gloria Sarno testified that all loans to and from GMA and GMFC were recorded and notes or contracts were prepared. GMFC loaned approximately 1.7 million to GMA. However, the loan documentation, obtained pursuant to discovery, totals $662,500 (including Exhibit 15 and 16, the "NOTE AND SECURITY AGREEMENT"). When confronted with the discrepancy between Exhibit 270, pages 1 to 16, and her testimony regarding the amount of money loaned to GMA, Gloria Sarno did not know if more loan documentation existed.

Most of the loans were unsecured.

Dr. Stone testified as to the late accounting entries. The date that an accounting entry was made was shown in the general ledgers next to the entry itself. Kimberly Saalfeld testified that late entries were made, but such entries would be made within 8 months of the end of the year for tax purposes. What is unusual is the number of entries made more than a year (and sometimes more than two years) after the end of the year in which the accounting records pertain. Kimberly Saalfeld wasn't the only person to perform accounting functions for the

entries. Clearly, someone was making these unusual entries. In the GMFC general ledgers, Exhibit 356, pages 73 through 83, there is a whole group of accounting entries made on the dates beginning January 2, 1996 through February 16, 1996. However, these general ledgers were for the fiscal year ended November 30, 1993. More than two years passed before the entries were made. These entries affect the accounts receivables of GMFC and record amounts due to GMFC from GMA.

GMA has similar entries. An example is shown on Exhibit 318, pages 8 and 9, where entries are made on August 15, 1995 when the fiscal year ended December 31, 1993. Here 19 months passed before the entries were made. On the GM Torrance general ledgers, late entries are shown on Exhibit 344, pages 8 and 9 (G/L period 1 fiscal year 94). Here, there are entries made on January 31, 1995 in the general ledgers for January 1994. These entries deal with GMA.

What is significant is that one finds this type of accounting in the books of all three entities. Kimberly Saalfeld herself stated, that at the latest, the books should be closed within eight months from the end of the year. No doubt, these entities pay taxes, or at the very least, file tax forms. If it is presumed that those entities file tax forms on time, clearly changes are made to the accounting books long after the forms are filed. The fact that GMA, GM Torrance and GMFC engage in the same suspicious accounting conduct is a factor in showing that they operate as a single entity.

Exhibit 184 shows the licensing agreement between GMA and GMFC. The license permits the use of the Gloria Marshall name for $10.00. No conditions for the use of the license are listed in the agreement. Mark Bergendahl testified that no supervision of the license took place, nor were there any controls dictated by Gloria Sarno or GMFC as to the use of the license. Gloria Sarno testified that she never reviewed any policy or procedure manuals of GMA to verify that GMA provided the Gloria Marshall program to its patrons. Similarly,

she never reviewed the GMA patron agreements (Exhibit 193, pages 1 to 6) to determine if they were in compliance with the "Contracts for Health Studio Services" laws. Gloria Sarno testified that she knew about the laws because she and Mark discussed the law when creating GM Torrance patron agreements before she opened the Torrance salon (Exhibit 193, page 7).

The license agreement was terminated on May 31, 1994 (Exhibit 185 and Exhibit 197, page 00027). Gloria Sarno testified that GMFC and GMA terminated the license agreement because of negative publicity and the amount of money GMFC had given to GMA. However, she did not know if GM Utah or GM Ohio had a license agreement with GMFC at the time of the GMA closing (which were still in existence). Also Gloria Sarno did not know the names of the principals of GMA and GM Ohio.

GMFC's insurance of its trademark to GMA warrants extended scrutiny here. The apparent nakedness of the license agreements supports Plaintiff's argument that GMFC is the alter ego of GMA. For purposes of preserving both the goodwill built up in the mark, as well as the validity of the trademark reservation, a licensor at arms length with its licensee is likely to have retained some control in the agreement, even if only the right to unilaterally cancel the license.

While the absence of supervisory controls in a license ordinarily signals involuntary trademark abandonment and the forfeiture of trademark protection, courts have made an exception when the parties have engaged in a close working relationship. In licensing its trademark, GMFC provided GMA with the mans to mislead the public and engage in unfair business practices. By placing into the hands of its licensee the means to mislead the public, GMFC has violated section 17200 and section 17500.

In California, the seminal decision addressing the

liability of a trademark licensor for the acts of its licensee is Kasel v. Remington Arms Co. (1972) 24 Cal.App.3d 711, a personal injury products liability case. The defendant (Remington) licensed its trademark to a Mexican firearm ammunition manufacturer (CDM). Injured by a defective CDM shell, the plaintiff brought a strict liability action against Remington. The Second District Court of Appeal held that in utilizing an enterprise stream of commerce liability, a Court may find a trademark licensor liable for the acts of a licensee by considering, inter alia, such factors as the licensor's organization, control, and financing of its licensee, and the amount of royalties it received. The court stressed that is "decision (was) confined to the specific facts of this case, "including that Remington retained rights of control over the quality of CDM's product. Id. At 739.

The Kasel court adopted the approach of finding liability by looking at the trademark licensor's role as a link in the marketing enterprise. While Kasel analyzed the issue based on the policies underlying the stream of commerce theory, that the doctrine of strict tort liability for defective products is applicable to the overall producing and marketing enterprises responsible for placing such products in the stream of commerce, the court also acknowledged consumer reliance on the trademark name as a factor in imposing the liability. The imposition of strict liability was based, in part, on the "defendant's participatory connection ... with the enterprise that created consumer demand for and reliance upon the produce." Id. At 725.

In a footnote, the Kasel court cited with approval an article entitled, Tort Liability of Trademark Licensors, 55 Iowa L.Rev. 693 (1970), which advocated the extension of products liability to include trademark licensors. The court quoted the following conclusion:

"It is inconsistent to hold producers, manufacturers, and other in the line of supply to a standard of care with respect to the public, and at the same time permit the trademark owner to

escape this responsibility by entering into a license agreement. If the mark owner were to utilize the mark on his own product, the traditional theories of products liability would provide the injured consumer with a remedy. The facts that the trademark is an important factor in consumer product selection and that the mark owner has a great influence on the quality of the final product are not changed by the licensing agreement. All that is changed is the mark owner's duty to the public with respect to these products." Kasel, 24 Cal.App.3d at 725 n. 17.

Although this action is not a strict liability action for a defective product, but instead, an action on behalf of consumers injured by false and deceptive advertising and unfair competition practices, some of the principles for finding a trademark licensor liable under Kasel are applicable here.

In this case, GMFC played a significant role as a link in the marketing enterprise both in its financial involvements with GMA, its participation in media advertising with GMA, and significantly in its licensing of the Gloria Marshall mark to GMA. If "trademark is an important factor in consumer selection," (Ibid.), then it follows that licensing a trademark is itself an important link in a marketing enterprise. Goodwill built up in the Gloria Marshall name created demand for GMA's services and induced reliance on the part of consumers. GMA patrons stated that they enrolled in the program because of their reliance on the Gloria Marshall name. Use of the mark in advertising and marketing created the impression that the licensor was responsible for the services that stood behind them. Therefore, GMFC's act of licensing the mark was an integral part of placing the trademark service into the stream of commerce.

Other cases in California have found the trademark licensor liable for the acts of the licensee in actions other than strict liability for defective products. Two such cases, Beck v. Arthur Murray, Inc. (1966) 245 Cal.App.2d 976, and Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, were actions